No. 84-262

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,

Petitioner,

v.

PUEBLO OF SANTA ANA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

64 pp

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Atchison, Topeka and Santa Fe Railway Company ("AT&SF") hereby respectfully moves for leave to file the enclosed Brief *Amicus Curiae* in support of the Petition for Certiorari in this case. The consent of the attorney for the Petitioner has been obtained. The consent of the attorney for the Respondent was requested but refused. As grounds for this Motion, AT&SF states that it has a substantial interest in the case because:

1. AT&SF operates an interstate railway system subject to the jursdiction of the Interstate Commerce Commission which provides interstate freight and passenger rail service over approximately 12,000 miles of track in twelve states;

2. In New Mexico, AT&SF's rail system crosses the lands of seven of the New Mexico Pueblos;

3. AT&SF was granted rights-of-way across each of the pertinent Pueblos prior to the enactment of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636;

4. Following enactment of the Pueblo Lands Act, each Pueblo granted to AT&SF new rights-of-way and each new right-of-way was approved by the Secretary of the Interior expressly acting pursuant to § 17 of the Pueblo Lands Act, the statute construed by the decision below;

5. Like the Petitioner, AT&SF was named by the United States in quiet title suits filed in behalf of each Pueblo pursuant to §§ 3 and 4 of the Pueblo Lands Act;

6. Upon AT&SF's obtaining the voluntary grant of new rights-of-way across the lands of the Pueblos and upon the approval of the rights-of-way by the Secretary of the Interior, the United States agreed to the entry of orders of dismissal, dismissing AT&SF from the quiet title suits;

7. The orders of dismissal entered by the federal district court in the quiet title suits, similar to that entered as to the Petitioner, stated that AT&SF had obtained valid rights-of-way pursuant to § 17 of the Pueblo Lands Act;

8. Like the Petitioner, AT&SF was unaware of any contention that its rights-of-way were invalid until the District Court entered its decision in this suit. Since that time, AT&SF has been sued by the Pueblo de Acoma (United States District Court for the District of New Mexico, No. CV-82-1550) and the Pueblo of Isleta (No. CV-82-1537). In both suits the Pueblos rely upon the District Court's opinion in the present case.

9. If the Tenth Circuit decision stands, it may significantly impair AT&SF's ability to provide freight and passenger rail service across New Mexico; thus the legal issues raised in the Petition and discussed in the enclosed Brief *Amicus Curiae* could have a direct and immediate bearing on the ability of AT&SF to continue operation of its interstate railway system across New Mexico.

10. For these reasons, this Motion for Leave to file a Brief *Amicus Curiae* should be granted.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether principles of deference to contemporaneous administrative interpretation of statutory authority require construction of § 17 of the Pueblo Lands Act to have authorized Pueblos to grant rights-of-way approved by the Secretary of the Interior?

2. Whether the administrative interpretation that § 17 of the Pueblo Lands Act authorized a Pueblo to grant rights-of-way conditioned upon approval of the Secretary of the Interior offends any principle of the Indian Nonintercourse Acts?

3. Whether Congress' provision for comparable actions to be brought by the United States precludes implication of a private right of action for tribes or Pueblos? And,

4. Whether the consensual dismissal by the United States on behalf of an Indian Pueblo of a Pueblo Lands Act quiet title suit is *res judicata* of a subsequent suit filed by the Pueblo on the same claim 50 years later?

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BRIEF *AMICUS CURIAE* OF THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

The *amicus curiae*, The Atchison, Topeka and Santa Fe Railway Company, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on May 14, 1984.

OPINION BELOW AND JURISDICTION

The opinion of the Court of Appeals and the grounds underlying this Court's jurisdiction are adequately described in the Petition for Writ of Certiorari of the Petitioner, Mountain States Telephone and Telegraph Company ("Mountain Bell"), filed August 13, 1984.

INTEREST OF THE *AMICUS CURIAE*

The Atchison, Topeka and Santa Fe Railway Company ("AT&SF") is a rail carrier operating an interstate railway system subject to the jurisdiction of the Interstate Commerce Commission under the Revised Interstate Commerce Act, 49 U.S.C. §§ 10101-11917 (Supp. 1984). AT&SF's railway system provides interstate freight and passenger rail service over approximately 12,000 miles of track in 12 states. Across New Mexico, AT&SF's rail service is made possible by rights-of-way across lands of seven of the New Mexico Pueblos, whose lands occupy substantial portions of central New Mexico: the Pueblo of Santa Ana, the Pueblo of San Felipe, the Pueblo of Sandia, the Pueblo of Isleta, the Pueblo de Santo Domingo, the Pueblo de Acoma, and the Pueblo of Laguna. The decision below, by threatening invalidation of portions of AT&SF's rights-of-way across Pueblo lands, obtained by virtue of grants pursuant to § 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636 ("§ 17"), poses a significant threat to the continuity of AT&SF's service. Consequently, the decision threatens one of the primary goals of the Revised Interstate Commerce Act: to "ensure the development and continuation of a sound rail transportation system . . ." 49 U.S.C. § 10101a (Supp. 1984). Indeed, the Pueblos of Isleta and Acoma have already sued to eject AT&SF from their lands based on the decision below.

Before 1924, AT&SF had obtained rights-of-way across each of the pertinent Pueblos' lands. However, following enactment of the Pueblo Lands Act of 1924, AT&SF obtained the voluntary agreement of each Pueblo to new rights-of-way, and each new right-of-way was approved by the Secretary of the Interior expressly acting pursuant to § 17 of the Pueblo Lands Act. As to the Respondent, Pueblo of Santa Ana ("the Pueblo"), AT&SF was granted, upon the payment of additional compensation, a § 17 easement from the Pueblo on October 5, 1928.

It is further significant to an understanding of the historical context of this case that AT&SF, like Mountain Bell, and the United States, acting on behalf of each Pueblo, agreed to consent decrees in quiet title suits filed by the United States pursuant to the Pueblo Lands Act. The statutory purpose of such suits was to quiet title to the Pueblo lands, Pueblo title to which was asserted "not to have been extinguished." Pueblo Lands Act § 3, App. 23. AT&SF's position is further markedly similar to that of Mountain Bell in that the orders of dismissal as to AT&SF recited that it had obtained valid rights-of-way pursuant to § 17 of the Pueblo Lands Act. AT&SF was unaware of any contention that its rights-of-way were invalid until the District Court entered its decision in this suit.

If the decision below were to stand, it could significantly impair AT&SF's ability to econmically provide rail service.[1] Present regulations of the Department of the Interior require the consent of an Indian tribe to the granting or renewal of any right-of-way across tribal lands. *See* 25 C.F.R. §§ 169.3(a), 169.19, 169.23(a) (1984); *see also Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 393 (1983). Consequently, it cannot be ascertained that AT&SF would be allowed to maintain its railway facilities in their existing locations on Pueblo lands. The practical and economic effect on AT&SF of being required to re-route its tracks, assuming such were feasi-

---

[1] The decision below could result in a conflict with the statutory mandate of the Interstate Commerce Act. Pursuant to that Act, AT&SF may abandon a rail line of discontinue service only upon a finding by the Interstate Commerce Commission that such abandonment is required by "present or future public convenience and necessity . . ." 49 U.S.C. § 10903 (Supp. 1984). If the decision below stands and AT&SF is denied possession of the lands of any Pueblo, AT&SF could be prevented from continuing its present service.

ble, are staggering:[2] AT&SF would be required to plan for and acquire scores of miles of new rights-of-way despite subsequent development of adjoining areas that would result in greatly increased right-of-way and construction cost. AT&SF would further be prejudiced by having to construct over less desirable terrain and over a longer route (the existing location of AT&SF's lines provides the shortest route subject to the engineering constraints affecting rail transportation) and by the attendant increased cost and disruption of service.

STATUTORY PROVISIONS INVOLVED

Pueblo Lands Act of June 24, 1924, § 17: The full text of the Pueblo Lands Act of 1924, 43 Stat. 636, is reproduced as Appendix C. [App. 22-33].

Indian Trade and Intercourse Act ("Nonintercourse") of 1834, Act of June 30, 1834, 4 Stat. 730, 25 U.S.C. § 177 (1982). The full text of the Indian Nonintercourse Act of 1834 is reproduced as Appendix D. [App. 34].

REASONS FOR GRANTING THE WRIT

I. The Decision Below, Invalidating All Rights-of-Way Granted Under the Pueblo Lands Act, Decides Important Questions Concerning That Act in a Manner That Conflicts With the Decisions of This Court.

The decision below constitutes a significant misapplication of principles of statutory construction, administrative law, and Indian law decided by this Court. The Court of Appeals' opinion would invalidate all rights-of-way granted pursuant to an Act of Congress without any pretense that the rejected practice prejudiced the substantive interests of any Pueblo.[3] Based upon the erroneous conclusion that the statute is unambiguous, the Tenth Circuit opinion discards a contemporaneous administrative construction of the statute long relied upon by scores of grantees. Significantly, neither of the opinions below cites any case invalidating a conveyance voluntarily granted by a tribe or Pueblo and approved by the Secretary. Consequently, the opinions below make new and potentially far-reaching law: that a statute specifying a form of federal approval as a condition to the validity of a tribal conveyance does not supply any needed congressional authorization for a conveyance so approved. This Court's Indian lands decisions refute that proposition. Certiorari should be granted to correct this fundamental divergence from the decisions of this Court.

[2] It must be assumed that such cost and dislocation of service would be known to Pueblos. Consequently, if the Court of Appeals' decision should stand, it must be anticipated that negotiations for renewal will center upon the economic consequences to AT&SF of a Pueblo's flatly withholding consent to a right-of-way and, thereby, forcing a possible relocation of facilities, assuming relocation is feasible.

A. *The Decision Below Conflicts with Decisions of This Court Requiring Consideration of All Factors Bearing on Congressional Intent.*

The fundamental flaw in the Tenth Circuit opinion is its conclusion that § 17 is unambiguous with respect to the validity of Pueblo conveyances and, consequently, it was not required to consider other indications of congressional intent.[4] Judge Breitenstein's opinion for the Tenth Circuit held that § 17 unambiguously imposed two requirements on the validity of Pueblo conveyances:

[3] Any assertion of prejudice would, in any event, be untenable because, at the time Mountain Bell's (and AT&SF's) rights-of-way were granted, Congress had also provided for condemnation of Pueblo lands. Act of May 10, 1926, 44 Stat. 496; *see Plains Electric Generation & Transmission Co-op., Inc. v. Pueblo of Laguna*, 542 F.2d 1375 (10th Cir. 1976).

[4] The Tenth Circuit suggests that the Pueblo's status as an Indian tribe would have compelled a conclusion in the Pueblo's favor if Section 17 were ambiguous. [App. 8-9]. The principle cited neither requires that all ambiguities be resolved in favor of Indians, *Rice v. Rehner*, 103 S.Ct. 3291, 3302 (1983), nor relieves a court of the duty to address all matters that reflect congressional intent, which is controlling as to the Pueblo's property rights. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

the subsequent congressional enactment of specific statutory authority for the conveyance *and* the approval of any conveyance so authorized by the Secretary of the Interior. The court, therefore, determined it was not required to consider an undisputed administrative interpretation that contradicted its views. [App. 9] It further neglected to consider this Court's Indian Nonintercourse Act rulings, which plainly do not contemplate any such dual requirement. The Tenth Circuit erred in diregarding the rule that, even where a statute assertedly is unambiguous, its language must be construed in light of its purpose and the construction placed upon it by the agency charged with its administration. *Chemehuevi Tribe of Indians v. F.P.C.*, 420 U.S. 395, 404, 409 (1975).

Section 17 is ambiguous because its two main clauses employ different terms to describe the subject of their provisions. Because the Pueblo Lands Act addressed two discrete problems concerning Pueblo lands, susceptible to different solutions, the Tenth Circuit erred in rejecting the administrative construction that Congress did not intend the first clause to impose additional conditions upon the voluntary conveyances that are the subject of the second clause. The historical context of the Pueblo Lands Act readily supplies independent purposes to the two provisions. The Act addressed two principal concerns respecting Pueblo lands, both arising from prior uncertainty as to the existence of federal restraints on alienation of Pueblo lands. First, Congress desired to prevent the involuntary loss of Pueblo lands which previously had resulted from state law condemnations, effects of judgments, the non-payment of taxes, state law adverse possession, and the like. *See* Hearings on S. 3865 and S. 4223 Before Subcommittee of the Committee on Public Lands and Surveys, U.S. Senate, 67 Cong., 4th Sess. 230-35 (1923). Second, Congress intended to resolve questions as to the validity of conveyances by Pueblos and their members and to make clear that the

Indian Nonintercourse Act of 1834, 25 U.S.C. § 177 (1982), was applicable to Pueblos. [*See* Petition, 16, n. 6-8]

The two clauses of § 17 were intended to address independently these two problems respecting Pueblos lands. Section 17 provides:

> No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the lands of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

Pueblo Lands Act, § 17. The first major clause addresses the main congressional concern arising from prior involuntary loss of lands under state law; the second major clause imposes an express restraint upon alienation, thus impliedly authorizing Pueblos to convey upon satisfaction of the statutory condition of Secretarial approval. Section 17 may not be considered unambiguously to have imposed both conditions upon the conveyances referred to only in the second clause [*see* Petition, 20].

The Tenth Circuit's only explanation for its conclusion that the Section is unambiguous, the observation that "[t]he two clauses of § 17 . . . are joined by the conjunctive 'and'" [App. 8], does not harmonize its provisions. A provision prohibiting the acquisition or initiation of rights in Pueblo lands under the laws of the State of New Mexico or otherwise, on its face, addresses matters different from federally approved sales, grants, leases or

conveyances. The statute is, at least, ambiguous as to whether the condition of the first clause is imposed on the conveyance of the second. Certainly, the statute does not contain a plain, unequivocal command precluding the administrative interpretation. As this Court stated in *Boy's Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 250 (1970),

> Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions.

See also Tidewater Oil Company v. United States, 409 U.S. 151, 159 (1972). The Tenth Circuit's myopic determination not to probe the administrative and historical record to ascertain whether Congress intended the construction applied by the agency was error.

The Court of Appeals' interpretation of § 17 as prohibiting, rather than authorizing, conveyances by a Pueblo with the consent of the Secretary further conflicts with the statutory purpose of the Act to comprehensively settle the status of Pueblo lands. *See* S. Rep. No. 498, 68th Cong. 1st Sess. 5 (1924). Given the construction applied below, the Act would have rendered Pueblo lands, unlike the lands of all other tribes, unavailable for even consensual use by non-Indians, even for publicly needed rights-of-way, by any procedure. Nothing in the legislative history indicates such an intention. The decision below thus erroneously construes the Section in a manner inconsistent with a central purpose of the Pueblo Lands Act: to provide a workable scheme for the administration of Pueblo lands. *See Escondido Mutual Water Company v. La Jolla Band of Mission Indians*, 104 S.Ct. 2105 (1984).

The first clause of § 17 should be given its obviously intended effect, to make clear the inapplicability of state

law and to require that existing federal statutes authorizing conveyances of interests in tribal lands, many of which did not require tribal consent, be made specifically applicable to Pueblos.[5] Section 17's second clause can then be understood as providing statutory authority for any needed conveyance duly consented to by a Pueblo, until Congress should thereafter provide by specifically legislating that other Acts should apply to Pueblo lands.[6] This was plainly the agency's view. Because the administrative interpretation is a reasonable one, the Court of Appeals erred in substituting its views for those of the agency. *Udall v. Tallman*, 380 U.S. 1, 4 (1965).

B. *The Decision Below Conflicts With Decision of This Court Requiring Deference to Administrative Interpretation.*

The most significant canon of construction prescribed by this Court and disregarded by the decision below recognizes that

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[5] As Mountain Bell has demonstrated, this interpretation of the first clause is reflected in the legislative history of subsequent enactments. When the consent of the Jemez Pueblo was denied for a railroad right-of-way, Congress was requested to, and did, further legislate to provide condemnation of Pueblo lands. Act of May 10, 1926, 44 Stat. 498. Congress subsequently extended to Pueblo lands other specific rights-of-way Acts authorizing the Secretary to grant rights-of-way without tribal consent. Act of April 21, 1928, 45 Stat. 422, 25 U.S.C. § 322 (1982). It appears that the BIA considered these Acts to provide authority for rights-of-way when Section 17 was unavailable because a Pueblo would not consent. [*See* Petition, 19].

[6] It should be noted that the decision below will not affect future grants of rights-of-way. Present regulations of the BIA purportedly authorized by the General Purpose Rights-of-Way Act, of February 5, 1948, c.45, § 1, 62 Stat. 17, 25 U.S.C. §§ 323-328 (1982), prescribe what the BIA considers to be generally applicable procedures for present and future grants of rights-of-way. 25 C.F.R. §§ 169.1-169.28 (1984); *see Plains Electric Generation & Transmission Co-op., Inc. v. Pueblo of Laguna*, 542 F.2d 1375, 1381 (10th Cir. 1982).

> a longstanding, uniform construction by the agency charged with the administration of the [Act], particularly when it involves a contemporaneous construction of the Act by the officials charged with the responsibility of setting its machinery in motion is entitled to great respect.

Chemehuevi Tribe of Indians v. F.P.C., 420 U.S. at 410-11.

The Court of Appeals did not dispute that the Secretary's approval of at least 60 rights-of-way spanning a period of nearly 30 years constituted both a contemporaneous interpretation and a longstanding one; rather, it concluded that "courts are the final authorities on statutory construction and are not obliged to accept an administrative construction which they deem inconsistent with a statutory mandate . . ." [App. 9]. The Tenth Circuit neglected, however, to recognize that, especially where much time has elapsed, agency officials implementing statutory commands are held to have a better view of the "statutory mandate" than a reviewing court many years later—especially where, as here, the agency officials participated in the legislative process. *See Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers*, 367 U.S. 396, 408 (1961); *see also United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982).

As applied to the facts of this case and to the administrative practice invalidated, this rule is particularly compelling. Interior Department officials testified before Congress in the legislative hearings on the Pueblo Lands Act. S. Rep. No. 492, 68th Cong. 1st Sess. 154-55 (1924). Beginning in April, 1926, the BIA, Southern Pueblos Agency, began approving rights-of-way pursuant to § 17. [R. Vol. II, 2, 6] Sixty such rights-of-way were granted, each voluntarily granted by the affected Pueblo, and each approved at the level of Secretary or Assistant Secretary

of the Interior.[7] [R. Vol. II, 7] Significantly, the Pueblos, who participated vigorously in the formation of the Pueblo Lands Act, *see* L. Kelly, *The Assault on Assimilation, John Collier and the Origins of Indian Policy Reform*, 255-93 (1st ed. 1983), affirmed the administrative construction by joining in each conveyance. The deciison below significantly deviates from this Court's opinions by holding the contemporaneous administrative interpretation not to be pertinent to its construction of the Act.

II. The Decision Below Conflicts With This Court's Historic Interpretation of the Indian Nonintercourse Acts.

The decisions below are further flawed by their premise that the Indian Nonintercourse Act of 1834 requires some greater expression of Congressional intent to validate voluntary tribal conveyances than the express provision that such conveyances shall be invalid unless approved by the Secretary. Contrary to the premise of the lower court, this Court consistently has recognized the validity of conveyances pursuant to comparable provisions, and its cases affirm a tribal power of alienation subject to the federal supervision designated in statutory restraints on alienation.

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[7] The Interior Department also considered it had general authority to grant rights-of-way across lands of any tribe pursuant to identical procedures. In introducing legislation that became the 1948 General Purpose Rights-of-Way Act, 25 U.S.C. §§ 323-328 (1982), Under Secretary of the Interior, Oscar L. Chapman, wrote to Arthur H. Vandenberg, President *pro tempore* of the Senate,

> When it is discovered that an application for a right-of-way may not be granted under existing statutory authority, which is often the case, the right must then be obtained by means of easement deeds executed by the Indian owners and approved by the Secretary of the Interior.

S. Rep. No. 823, 80th Cong., 2d Sess. 3-4 (1948), *reprinted in* 1948 U.S. Code Cong. & Ad. News 1033, 1036. Thus, the administrative practice was comparable to that applicable other tribes.

Section 17's second clause provides:

> no sale, grant, lease of any character or other conveyance of lands, or any title or claim thereto, made by any pueblo as a community . . . shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

The District Court concluded that this provision did not comport wtih prerequisites of the Nonintercourse Act of 1834, because it "was not a clear and express grant of authority to the Secretary and the Pueblos to alienate Pueblo lands." [App. 39] The Court of Appeals affirmed the trial court's view that "§ 17 was intended as an extension to the Pueblos of the Nonintercourse Act, in prohibiting alienation of pueblo lands except as Congress may provide in the future and as approved by the Secretary." [App. 5] Both courts then concluded that Congress' intention to apply the Nonintercourse Acts to Pueblos by the Pueblo Lands Act supported the holding that § 17 was not intended to authorize voluntary conveyances approved by the Secretary. This Court's cases refute that premise and the conclusion derived from it.

The attempt of the Court of Appeals to engraft upon this Court's Nonintercourse Act rulings a requirement that Congress affirmatively authorize each conveyance or class of conveyances is unsupportable. As this Court concluded upon review of the Nonintercourse Acts,

> It is well settled that a good title to parts of the lands of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe, without any act of Congress, or any patent from the Executive authority of the United States.

Jones v. Meehan, 175 U.S. 1, 10 (1899). This rule is founded in the notion that federal, and not necessarily congressional, supervision of tribal conveyances is contemplated by the Nonintercourse Acts. The Nonintercourse Act of 1834 confirms this proposition: the treaties and conventions that it provided could authorize tribes to

convey their lands were not Acts of Congress, but agreements made by a representative of the President with the advice and consent of the Senate. *See* F. Cohen, *Federal Indian Law* 39 (Univ. of N.M. Reprint, 1942 ed.)

The historical underpinnings of fereral restraints on alienation are well established. Federal restraints are grounded in the principle that came to be acknowledged by the maritime powers during the period of discovery and colonization of the New World, *see Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 573 (1823), that the "nation making the discovery [obtained] the sole right of acquiring the soil and of making settlements of it. . . . [Discovery] gave the exclusive right to purchase, but did not found that right on a denial of the right of the [tribal] possessor to sell." *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 244 (1872). Chief Justice Marshall's decision in *Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1835), surveyed the legal history of tribes' powers with respect to their lands, both in the English and Spanish coolnies. 34 U.S. (9 Pet.) at 736-760. In rejecting the contention that a conveyance of Indian land was invalid because approved only by a local Spanish governor, and not by direct royal confirmation, Justice Marshall concluded that:

> The Indian right to the lands as property was not merely of possession, that of alienation was concomitant; both were equally secured, protected and guaranteed by Great Britain and Spain, subject only to ratification and confirmation by the license, charter, or deed from the governor representing the king.

Id. at 759-60. The Nonintercourse Acts did not alter these colonial rules; those Acts "recognized and enforced" them. *Jones v. Meeham*, 175 U.S. at 9.

This Court's description of Nonintercourse Act requirements for Pueblo conveyances in *United States v. Candelaria*, 271 U.S. 432 (1926), reinforces that the Nonintercourse Acts contemplated the validity of tribal con-

veyances made subject to federal approval. *Candelaria* recognized that, under Spanish law, Pueblos "could alienate their lands only under governmental supervision . . .", and that Mexican law imposed similar restraints. 271 U.S. at 442. Justice Van Devanter's decision for this Court held Nonintercourse Act requirements to be comparable:

> Thus it appears that Congress in imposing a restriction on the alienation of these lands as we think it did, was but continuing a policy which prior governments had deemed essential to the protection of such lands.

271 U.S. at 442. All § 17 rights-of-way having been approved by the Secretary or Assistant Secretary of the Interior, the cases of this Court refute the assertion that historic interpretation of the Nonintercourse Act requires a greater measure of federal supervision or a more specific authorization than that provided by § 17. The almost verbatim incorporation of the Nonintercourse Act of 1834 in the second clause of § 17 strongly supports that Congress intended its provisions to reflect this historic construction.

The Court consistently has recognized that statutes affirmatively imposing a restraint upon alienation give rise to valid title upon satisfaction of the condition stated. In *Pickering v. Lomax*, 145 U.S. 310 (1892), this Court held valid a deed granted pursuant to a treaty provision nearly identical to the second clause of § 17:

> The tracts of land herein stipulated to be granted shall never be leased or conveyed by the grantees, or their heirs, to any persons whatever, without the permission of the president of the United States.

145 U.S. at 311. This Court's interpretation of the treaty provision in *Pickering* strongly supports the administrative construction of § 17:

> The object of the proviso was not to prevent the alienation of lands *in toto*, but to protect the Indian against the improvident disposition of his property, and it will be presumed that the president, before affixing his approval, satisfy himself that no fraud or imposition had been practiced upon the Indian when the deed was originally obtained.

145 U.S. at 316; *see also Lomax v. Pickering*, 173 U.S. 26 (1899); *Smith v. Stevens*, 77 U.S. (10 Wall.) 321 (1870).

This rule that conveyances made in conformity with a restraint on alienation requiring only government approval are valid when so approved is also reflected in the two cases relied upon in *United States v. Candelaria*, 271 U.S. at 442, as applying rules comparable to those of the Nonintercourse Act to Indian grants under Spanish and Mexican law, respectively. *Chouteau v. Moloney*, 57 U.S. (16 How.) 203, 207 (1853); *and United States v. Pico*, 72 U.S. (5 Wall.) 536, 540 (1867). The decision below, thus, conflicts with the requirement that Indian statutes "must be read in light of common notions of the day and the assumptions of those whose drafted them . . . ." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978)[8]

For nearly two centuries, and until the decisions under review, it has uniformly been held that statutes imposing a restraint upon alienation imply the validity of conveyances rendered upon satisfaction of the restraint The engrafting by the courts below of an additional requirement of express affirmative authorization for the conveyance would unquestionably cloud countless outstanding titles. Certiorari should be granted to correct this fundamental misapprehension of the Nonintercourse Acts and of the Pueblo Lands Act and, further, to prevent unwarranted clouding of long-settled titles.

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[8] Additionally, courts and the Interior Department have repeatedly referred to § 17 as authorizing conveyances subject to the condition of Secretarial approvel. *See, e.g., Alonzo v. United States*, 249 F.2d 189, 195 (10th Cir. 1957); *The Legal Status of the Indian Pueblos of New Mexico and Arizona*, 57 I.D. 36, 49 (August 9, 1939); *see also Pueblo of Isleta v. Universal Constructors, Inc.*, 570 F.2d 300, 302 (10th Cir. 1978); F. Cohen, *Federal Indian Law*, 392, 395-96 (Univ. of N.M. reprint, 1942 ed.).

III. The Decision Below Conflict With Decisions of This Court Governing the Implication of Private Rights of Action.

The opinions below raise a question to be resolved in *Oneida Indian Nation of New York v. Oneida County*, 719 F.2d 525 (2nd Cir. 1983), *cert. granted*, 104 S.Ct. 1590 (1984): whether the Nonintercourse Acts preempt any federal common law action for deprivation of tribal property rights allegedly without compliance with federal law; and, concomitantly, whether decisions of this Court preclude the implication of a private right of action on behalf of tribes under the Nonintercourse Act.[9] For the reasons stated in the dissent of Circuit Judge Meskill in *Oneida*, 719 F.2d at 544-549, certiorari should be granted to resolve the conflict between the decision below and this Court's decisions governing the implication of private civil actions for injunctive and money damage relief. *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18-19 (1979).

IV. Certiorari Should Be Granted Because the Decision Below Conflicts With the Decision of This Court in *Nevada v. United States*, 103 S.Ct. 2906 (1983).

The additional holding of the Court of Appeals, affirming the District Court's entry of summary judgment in favor of the Pueblo on Mountain Bell's *res judicata* defense, squarely conflicts with three principles of *Nevada v. United States*, 103 S.Ct. 2906 (1983). First, *Nevada* holds that *res judicata* policies are "at their zenith" with respect to final decrees entered decades ago which confirm interests in real property. 103 S.Ct. at 2918, n.10. Second, *Nevada* holds that a consent decree entered into in

[9] This issue was not raised in the lower courts. Briefing concluded below on July 8, 1983, prior to the September 29, 1983, decision in *Oneida*. Nonetheless, certiorari should be granted to consider the existence of private rights of action as to the possessory and money damage claims asserted in this action in tandem with the money damage claims asserted in *Oneida*.

conformity with a settlement agreement intended by the parties to finally resolve a controversy has preclusive effect and bars all matters that were the subject of the settlement. 103 S.Ct. at 2910, 2912. Finally, *Nevada* also holds that a consent decree entered against a tribe in a prior action in which it was represented by the United States is *res judicata* of a subsequent action by the tribe asserting claims that previously were settled, without regard to whether the tribe had an opportunity to intervene, was a party, or alleges the United States represented conflicting interests. 103 S.Ct. at 2912-25.

The decision below stands in contravention of these principles. The Court of Appeals' decision acknowledges that the 1928 consent decree was entered in satisfaction of the United States' agreement to dismiss the action if Mountain Bell would obtain Secretarial approval to a § 17 conveyance by the Pueblo. [App. 11] The assertion of the opinion below that the consent decree is deprived of *res judicata* effect because the federal judge may not have reviewed and ratified the settlement agreement [App. 12], conflicts with *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 (1975): "A Consent Decree or Order is to be construed for enforcement purposes basically as a contract . . .". Hence, its validity depends not on the intention of the entering court, but on the intention of the parties. *See* James, *Consent Judgments as Collateral Estoppel*, 108 U.Pa.L.Rev. 173, 175 (1959); *see also Southern Pacific Railroad Co. v. United States*, 168 U.S. 1, 49 (1897).

The decision below, disregarding Mountain Bell's undisputed reliance for over 50 years upon the 1928 consent decree, cannot be reconciled with the decisions of this Court. Significantly, Mountain Bell, in reliance upon the consent decree, took no action to obtain additional authorization for its rights-of-way despite that it was entitled to condemn the same right-of-way at least through the year, 1948. *See* Act of May 10, 1926, 44 Stat. 498; *see also Plains Electric Generation & Transmission*

Cooperative, Inc. v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. 1976). AT&SF also agreed to the consensual dismissal of quiet title actions filed by the United States for the benefit of Pueblos and, also, took no action to condemn rights-of-way during the period in which it was entitled to do so. Certiorari should be granted to consider the conflict between the decision below and the rulings of this Court; alternatively, this Court should vacate and remand the judgment of the Court of Appeals with directions to reconsider the judgment in light of *Nevada v. United States*, 103 S.Ct. 2906 (1983).

CONCLUSION

For the foregoing reasons, *amicus curiae*, the Atchison, Topeka and Santa Fe Railway Company, prays that a Writ of Certiorari be issued to review the Judgment and the Opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted this 13th day of September, 1984.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SLIP OPINION

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 83-1220

PUEBLO OF SANTA ANA,
Plaintiff-Appellee,

vs.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,
Defendant-Appellant.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Amicus Curiae

PUEBLO DE ACOMA,
Amicus Curiae

PUBLIC SERVICE COMPANY OF NEW MEXICO,
Amicus Curiae

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. No. 80-841-M Civ.)

(Filed May 14, 1984)

Scott E. Borg of Luebben & Hughes, Albuquerque, New Mexico, for Plaintiff-Appellee.

Kathryn Marie Krause, Denver, Colorado (Stuart S. Gunckel, Denver, Colorado, with her on the brief) for Defendant-Appellant.

Gary Crosby, Santa Fe Industries, Inc., Chicago, Illinois and John R. Cooney, Lynn H. Slade, John S. Thal and Walter E. Stern, III of Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, New Mexico, filed briefs on behalf of Amicus Curiae The Atchison, Topeka and Santa Fe Railway Company. Public Service Company of New Mexico joined in the Amicus Briefs of The Atchison, Topeka and Santa Fe Railway Company.

Arturo G. Ortega of Ortega & Snead, P.A., Albuquerque, New Mexico and Peter C. Chestnut of Albuquerque, New Mexico, filed a brief on behalf of Amicus Curiae of Pueblo de Acoma.

Before McWILLIAMS BREITENSTEIN and LOGAN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This is an interlocutory appeal from the United States District Court for the District of New Mexico which we permitted to be filed. The court granted partial summary judgment to the plaintiff-appellee, Pueblo of Santa Ana, and against the defendant-appellant, Mountain States Telephone and Telegraph Company, Mountain Bell. The dispute involves a right of way for a telephone and telegraph line across Pueblo lands. The trial court held in favor of the Pueblo and Mountain Bell appeals. We affirm.

The Pueblo was the owner of a tract of land situated in New Mexico which was a part of the El Ranchito

Grant. In November, 1927, the United States pursuant to the Pueblo Lands Act, 43 Stat. 636, filed an action in the federal district court for the district of New Mexico entitled United States as Guardian of the Pueblo of Santa Ana v. Brown, No. 1814 Equity (D.N.M. 1928), seeking to quiet title to this tract in the Pueblo. Mountain Bell was party to that suit. During the course of that litigation, the Pueblo entered into a right-of-way agreement with Mountain Bell, dated February 23, 1928, granting an easement to construct, maintain, and operate a telephone and telegraph line, the same line that is in controversy here. Acting pursuant to § 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636, 641-642, the Secretary of the Interior approved the agreement. The United States then moved to have Mountain Bell dismissed from the action on the ground that it had obtained title to the right of way through the easement agreement. In granting this motion, the court noted that it appeared "that since the institution of this suit said defendant has secured good and sufficient title to the right of way and premises in controversy. . . ."

In the present action Mountain Bell argues that it obtained a valid right of way across the Pueblo's land in 1928 and under § 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636. It argues further that the Pueblo's claims are barred by the 1928 dismissal of the case involving the same parties and issues. On these grounds, Mountain Bell moved for summary judgment that no trespass existed from 1928 to the present. The district court held, however, that § 17 did not authorize conveyance of lands by the Pueblo with the approval of the Secretary. The district court accepted the Pueblo's argument that § 17 was intended as a prohibition against the alienation of Pueblo lands except as Congress may provide in the future. Its requirements of Congressional authorization and Secretarial approval paralleled and were intended to extend to the Pueblo the Nonintercourse Act's requirement of a treaty or convention entered into

pursuant to the Constitution. See Acts of June 30, 1834, 4 Stat. 729, 730 § 12 (codified at 25 U.S.C. § 177), and February 27, 1851, 9 Stat. 574, 587 § 7. The court further held that the Pueblo's claims were not barred by the 1928 dismissal order because that order did not constitute a final judgment.

Section 17 of the Pueblo Lands Act provides:

> "No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, *or in any other manner except as may hereafter be provided by Congress, and* no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity *unless the same be first approved by the Secretary of the Interior.*" [Emphasis supplied.]

Mountain Bell challenges the argument of the Pueblo, upheld by the trial court, that § 17 was intended as an extension of the Pueblos of the Nonintercourse Act, in prohibiting alienation of Pueblo lands except as Congress may provide in the future and as approved by the Secretary. Mountain Bell argues that the first clause of § 17 requires Congressional approval for condemnations and other similar takings of Pueblo lands and that the second clause authorizes a pueblo to alienate its lands if it obtains Secretarial approval. Analysis of these arguments requires an examination of the language, the historical background, the legislative history, and the administrative history of the Act.

The Nonintercourse Act required a treaty or convention to alienate Indian lands, Act of June 30, 1834, 4

Stat. 729, 730 § 12 (codified at 25 U.S.C. § 177). The Act of February 27, 1851, 9 Stat. 574, 587 § 7, extended all laws then in force regulating trade and intercourse with the Indian tribes to include Indian tribes in the Territory of New Mexico.

In State of New Mexico v. Aamodt, 10 Cir., 537 F.2d 1102, cert. denied 429 U.S. 1121, a water right case, we reviewed the historical background of the controversy, pp. 1105 and 1109, and pointed out, p. 1105, that the efforts of federal officials to protect the Pueblos' property were frustrated by the New Mexico territorial courts which held that the Pueblos were outside the protection of federal laws. This rationale was upheld by the Supreme Court in United States v. Joseph, 94 U.S. 614.

We noted, at p. 1105, that the 1910 New Mexico Enabling Act, 36 Stat. 557, 558-559, defined "Indian country" to include "all lands now owned or occupied by the Pueblo Indians" and stated that such lands are "under the absolute jurisdiction and control of the Congress of the United States." The constitutionality of this provision was upheld in United States v. Sandoval, 231 U.S. 28, which specifically overruled United States v. Joseph. The Court said, Id. at 39, that,

> "The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government."

The Court noted that the United States has treated the pueblos "as requiring special consideration and protection, like other Indian communities." Id.

Because in the *Joseph* decision the Supreme Court decided that the Pueblo lands were not subject to the protective laws earlier passed by Congress, non-Indians were free to acquire Pueblo lands. The validity of titles so acquired became questionable when in Sandoval the Court held that the protective federal statutes did apply

and presumably always had applied. Congress responded with the passage in 1924 of the Pueblo Lands Act, 43 Stat. 636. The Act established a "Pueblo Lands Board" to investigate the Pueblo lands and determine those cases in which the Indian title should be extinguished. The United States as guardian of the Pueblos was required to institute quiet title actions to settle adverse claims to Pueblo lands. Non-Indians claiming title could plead adverse possession and the statute of limitations, defenses not ordinarily available against the United States.

In 1926, the Court in United States v. Candelaria, 271 U.S. 432, reaffirmed Sandoval. In so doing, it said after referring to the 1834 and 1851 acts, p. 441:

> "While there is no express reference in the provision to the Pueblo Indians, we think it must be taken as including them. They are plainly within its sight, and, in our opinion, fairly within its words, 'any tribe of Indians.' "

We echoed this language, noting the application of the Nonintercourse Act to the Pueblo Indians in Aamodt, supra. In Plains Elec. Gen. & Tr. Co-op v. Pueblo of Laguna, 10 Cir., 542 F.2d 1375, 1376, we cited Candelaria as authority for the statement that "Lands of the Pueblos cannot be alienated without the consent of the United States." In United States v. University of New Mexico, No. 83-1238, 10 Cir. opinion filed April 9, 1984, we noted that Congress extended the Nonintercourse Act to the Pueblos in 1851 and said that § 17 of the Pueblo Lands Act of 1924 "reaffirmed that the Pueblos and their lands were fully under the guardianship of Congress and the protection of the Nonintercourse Act." Slip Op. at 7. In so doing we noted the following statement in United States v. Chavez, 290 U.S. 357, 362:

> "[T]he status of the Indians of the several Pueblos in New Mexico is that of dependent Indian tribes under the guardianship of the United States and that

> by reason of this status they and their lands are subject to the legislation of Congress enacted for the protection of tribal Indians and their property."

Thus we have three times held that the Pueblo's lands were under the protection of the Nonintercourse Act.

Monutain Bell argues that § 17 was not a grant of power to the Pueblos to convey their lands, but instead reaffirmed the power of alienation which already existed in the Pueblos, and implemented the government's guardianship role by restricting that power. This view is insupportable. The House Report on the Pueblo Lands Act, reprinting the language of the Senate Report, states:

> "It was only by the decision of the case of the *United States v. Sandoval* (213 U.S. 28) that the Supreme Court of the United States definitely established the principle that these Indians were wards of the Government. . . .
>
> Up to the time of the decision of the *Sandoval* case in 1913, it had been assumed by both the Territorial and State courts of New Mexico, that the Pueblos has [sic] the right to alienate their property. From earliest times also the Pueblos had invited Spaniards and other non-Indians to dwell with them, and in many cases Pueblos and individual Indians attempted to convey lands to non-Indians which under the decision of the Sandoval case they were not competent to do." H.R. Rep. No. 787, 68th Cong., 1st Sess. 2 (1924).

It seems clear, then, that if § 17 is not a delegation of power, the 1928 agreement is void.

The terms of § 17 do not provide such authorization to the pueblos to grant their lands. The two clauses of § 17 of the Pueblo Lands Act are joined by the conjunctive "and." To us that means exactly what it says. No aliena-

tion of the Pueblo lands shall be made "except as may hereafter be provided by Congress" *and* no such conveyance "shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior." Two things are required. First, the lands must be conveyed in a manner provided by Congress. Second, the Secretary of the Interior must approve. As to the first, at the time of the agreement between the Pueblo and Mountain Bell, Congress had provided nothing. Hence, the first condition was not met. The fact that Congress had provided no method makes the approval of the Secretary meaningless. The operation of the second clause depends on compliance with the first clause.

Mountain Bell argues that to give the first clause the meaning which we have approved runs contrary to 25 U.S.C. §§ 311-322 providing among other things for rights of way for telephone and telegraph lines. The answer is that Congress did not extend the application of these statutes to the Pueblo Indians of New Mexico until the Act of April 21, 1928, see 25 U.S.C. § 322, which was after the Secretary had given his approval to the agreement, with Mountain Bell. The Secretary's approval, given on April 13, 1928 says that it was done pursuant to the provisions of § 17 of the Act of June 7, 1924.

Mountain Bell makes much of the legislative history of the Pueblo Lands Act. We have examined the Senate and House reports of the hearings. Hearings before a subcommittee of the Committee on Public Lands and Surveys, on S. 3865 and 4223, 67th Cong. 4th Session; Hearings before the Committee on Indian Affairs on H.R. 13452 and H.R. 13674, 67th Cong. 4th Session. We find that the most that can be said about them is that they are ambiguous and add nothing to the express language of the statute. If it be conceded that the statute is ambiguous, and we do not feel that it is, then as said in Bryan v. Itasca County, 426 U.S. 373, 392:

> ". . . we must be guided by that 'eminently sound and vital cannon,' *Northern Cheyenne Tribe v. Hollowbreast* 425 U.S. 649, 655 n. 7 (1976), that 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'"

See also United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 354.

Mountain Bell says that the administrative construction of the statute supports its contentions. Although the construction put on a statute by the agency charged with administering it is entitled to deference, the courts are the final authorities on statutory construction and are not obliged to accept an administrative construction which they deem inconsistent with a statutory mandate or frustrates congressional policy. SEC v. Sloan, 436 U.S. 103, 117-118; and FMC v. Seatrain Lines, Inc., 411 U.S. 726, 745-746. See also Plateau, Inc. v. Dept. of Interior, 10 Cir., 603 F.2d 161, 164. In our opinion, the administrative actions on which Mountain Bell relies violate the plain congressional intent of § 17 of the Pueblo Lands Act.

Mountain Bell argues that the Pueblo's claim is barred by the doctrines of res judicata and collateral estoppel because of the dismissal of Mountain Bell as a defendant in United States v. Brown, supra, No. 1814 Equity (D.N.M. 1928). The Brown suit was filed in November of 1927, under the Pueblo Lands Act of June 7, 1924. Mountain Bell neither entered an appearance in the case nor filed an answer. On April 13, 1928, the Assistant Secretary of the Interior approved an agreement between the Pueblo and Mountain Bell for a telephone lines easement across the Pueblo lands. The approval reads "APPROVED, pursuant to the provisions of Section 17 of the Act of June 7, 1924 (43 Stat. L. 636)."

The United States then filed a motion in the Brown case asking the dismissal of Mountain Bell and, as ground for the motion it alleged that,

> "subsequent to the institution of this suit said defendant has obtained a deed from the Pueblo of Santa Ana approved April 13, 1928, by the Secretary of the Interior in accordance with Section 17 of the Pueblo Lands Act of June 7, 1924, and that thereby said defendant has obtained, for an adequate consideration, good and sufficient title to the right of way in controversy herein between plaintiff and said defendant."

In its order granting the motion the trial court echoed the language of the motion. It failed to state whether it was with or without prejudice and it was, therefore without prejudice. See Ex Parte Skinner and Eddy Corp., 265 U.S. 86. Home Owners' Loan Corp. v. Huffman, 8 Cir., 134 F.2d 314, 317, says that Rule 41 Fed.R.Civ.P., which adopted this standard, followed long established practice in federal courts and is intended to clarify and make definite that practice.

Mountain Bell argues that the three requirements for application of res judicata or collateral estoppel are (1) identity of causes of action, (2) identity of the parties or privity, and (3) a final judgment in the first suit. Only the third need be considered. Mountain Bell says that a voluntary dismissal may be a final judgment for res judicata purposes if it addresses and resolves the issue originally in dispute. In making this argument, Mountain Bell relies largely on cases wherein a consent decree was issued. A consent judgment may assume any of several forms. When entered as a decree of dismissal with prejudice, the judgment is generally preclusive. See Bradford v. Bonner, 5 Cir., 665 F.2d 680, 682 and Bloomer Shippers Ass'n v. Illinois Central Gulf Railroad Co., 7 Cir., 655 F.2d 772, 777.

The dismissal order in Brown indicates neither the court's consideration nor approval of the agreement. The court said only that it appeared to the court that the defendant had secured good and sufficient title by a deed from the Pueblo approved by the Secretary of the Interior "in accordance with the provisions of Section 17 of the Pueblo Lands Act of June 7, 1924." There is no showing that the court was given a copy of the agreement. There were no findings of fact or conclusions of law.

In National Life & Accident Insurance Co. v. Parkinson, 10 Cir., 136 F.2d 506, 509, we said:

> "Courts do not validate that which is invalid by merely consenting to a dismissal of the controversy over which its jurisdiction has been invoked."

We have held that the agreement is invalid under § 17 in the absence of congressional action. Mountain Bell would have us hold that the agreement was valid under the action of the district court in dismissing the case without prejudice and making no effort to decide the validity of the agreement. We reject the arguments of res judicata and collateral estoppel.

Pursuant to Rule 56, Fed.R.Civ.P., Mountain Bell moved for a partial summary judgment dismissing the plaintiff's claims for trespass for the period 1928 to date alleging that it is not a trespasser by reason of the April 13, 1928, approval of the Secretary of the Interior. The trial court denied the motion saying, I R. p. 43:

> "The Pueblo shall recover damages from April 13, 1928 to the date the defendant's telephone and telegraph line was removed. Plaintiff's prayer for punitive damages is denied."

As the Pueblo points out, the commentators generally agree that where there is no geniune issue of fact, the court may enter summary judgment for either party, whether or not such party has made a motion therefor.

See 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2720, at 29-30, "the weight of authority is that summary judgment may be rendered in favor of the opposing party even though he has made no formal cross-motion under Rule 56."

Mountain Bell's motion does not address the claimed trespass prior to 1928, and hence the plaintiff's claim for damages for the period prior to 1928 remains at issue.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 80-841-M Civil

PUEBLO OF SANTA ANA,
Plaintiff,

vs.

MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

(Filed June 2, 1982)

This matter arises on cross motions for summary judgment by defendant, Mountain States Telephone and Telegraph Co., (Telephone) and plaintiff Pueblo of Santa Ana (Pueblo). The parties agree and I find that there are no material issues of fact as to the issues presented. The plaintiff is entitled to judgment as a matter of law as to those issues.

The Pueblo seeks damages from the defendant for a trespass which began in 1907 and has continued to the present. The trespass is a telephone and telegraph line constructed by defendant's predecessor across lands held by the Pueblo in fee simple but subject to federal restraints against alienation. Telephone argues it obtained a valid right of way across the Pueblo's land in 1928 pursuant to § 17 of the Pueblo Lands Act of June 7, 1924.

43 Stat. 636. Telephone also argues plaintiff's claims are barred by the judgment in *United States as Guardian of the Pueblo of Santa Ana v. Brown*, No. 1814 Equity (D.N.M. 1928). The issues presented are: (1) Did Congress, in § 17 of the Pueblo Lands Act, intend to grant to the Pueblos of New Mexico authority to alienate their land? (2) Are Santa Ana's claims barred by the judgment in *U.S. v. Brown*?

THE PUEBLO LANDS ACT

Section 17 of the Pueblo Lands Act provides:

> No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as herein before determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity and unless the [sic] be first approved by the Secretary of Interior.

It is not disputed that the Secretary, on April 12, 1928, approved the right of way granted to Telephone by the Pueblo. Pueblo argues, however, that Telephone could not obtain a valid right of way pursuant to § 17 because § 17 was an extension of the Indian Non-Intercourse Act to the Pueblos of New Mexico, and not a grant of authority to the Pueblos and the Secretary to alienate Pueblo lands. Pueblo maintains § 17's prohibition against the alienation of Pueblo lands except as Congress may provide in the future and its requirement of Secretarial approval closely parallels and was intended to extend to the Pueblos the Non-Intercourse Act's requirement of a treaty or convention negotiated by an officer of the United States to alienate Indian lands. Acts of June 30, 1834, 4 Stat. 730 § 12, (codified at 25 U.S.C. 177), and February 27, 1851, 9 Stat. 587. Telephone argues the first clause of § 17 refers to condemnation or other similar takings which Congress may authorize in the future and the second clause was intended by Congress to allow grants of Pueblo lands by the Pueblos so long as the approval of the Secretary was first obtained. A brief discussion of the circumstances surrounding the enactment of the Pueblo Lands Act is necessary to an understanding of the issue.

The Pueblo Lands Act was a congressional response to the confusion created by the Supreme Court's conflicting decisions in *U.S. v. Joseph*, 94 U.S. 614 (1876); *U.S. v. Sandoval*, 231 U.S. 28 (1913); and *U.S. v. Candelaria*, 271 U.S. 432 (1925). In *Joseph*, the issue was whether the Pueblos of the Rio Grande Valley of New Mexico were afforded protections under the Indian Non-Intercourse Acts. Acts of June 30, 1834, 4 Stat. 730, § 12 and February 27, 1851, 9 Stat. 587. The Act of June 30, 1834, among other things, forbade the transfer of Indian lands unless the grant "be made by treaty or convention entered into pursuant to the Constitution." Section 12 also requires that the treaty or convention be negotiated by an officer of the United States. The Act of February 27, 1851 extended the protections of the June 30, 1834 Act to the Indian Tribes of the newly acquired Territory of New Mexico. However, the Court in *Joseph* held the Acts did not apply to the Pueblos of New Mexico because, unlike other Indian Tribes, Pueblo land was owned in fee simple and also because the Pueblo Indians were sophisticated such that federal protections were not required. After the decision in *Joseph*, the United States made no effort to prevent encroachment on Pueblo lands.

However, the Court again had the opportunity to consider the status of the Pueblos in *Sandoral* and *Candelaria*. In *Sandoval* the Court held that the Pueblo Indians

were ethnically and historically "Indians" and that Congress had the power to define them as such in the New Mexico Statehood Enabling Act of June 20, 1910, 36 Stat. 557. In *Candelaria*, a quiet title action, the Court was again presented with the question of the applicability of the Indian Non-Intercourse Acts to the Pueblos. Acts of June 30, 1834 and February 27, 1851. In holding that the Pueblos were afforded the protections of the Non-Intercourse Acts, the Court stated,

> While there is no express reference in the provision (the provision prohibitting (sic) settlement on Indian Lands in the Act of 1834) to Pueblo Indians, we think it must be taken as including them. They are plainly within its spirit and, in our opinion, fairly within its words, 'any tribe of Indians.' Although sedentary, industrious and disposed to peace, they are Indians in race, custom and domestic government, always have lived in isolated communities, and are a simple, uninformed people, ill prepared to cope with the intelligence and greed of others." 271 U.S. at 442.

The decision in *Candelaria* created uncertainty in New Mexico for those who had settled on Pueblo lands between the time of the decisions in *Joseph* and *Candelaria*. In *Candelaria*, the Court held that the Pueblos were protected by the Non-Intercourse Acts and had been since the Acts were extended to the Pueblos of New Mexico in 1851. Therefore, those who had settled on Pueblo lands in good faith since 1851, were in violation of the Non-Intercourse Acts. The Pueblo Lands Act was Congress' response to this dilemma.

The Act created the Pueblo Lands Board and charged it with the responsibility of investigating title to Pueblo lands and filing actions in Federal District Court to recover certain lands of the Pueblos. Section 3. Other Pueblo lands, where the settlers could establish title under state or territorial law or where they could comply with the statute of limitations contained in Section 4 of the Pueblo Lands Act, were to be awarded to the settlers. Section 5. The Pueblos were to be compensated for property lost to the non-Indian settlers. Section 6.

In the Pueblo Lands Act, Congress was attempting to work an equitable solution to the thorny problem created by uncertainty as to the status of the Pueblo Indians. I am convinced that Congress was also, in § 17, reaffirming through congressional enactment what the Supreme Court decided in *Candelaria*: The Pueblos are Indians and wards of the federal government and Congress intended they be afforded the protections of the Indian Non-Intercourse Acts.

The Tenth Circuit reached a similar conclusion in *Plains Elec. Gen. and Tr. Co-Op. v. Pueblo of Laguna*, 542 F.2d 1375, 1381 (10th Cir. 1976). In *Plains*, the issue was whether Congress had repealed, by implication, a general Pueblo land condemnation statute by its subsequent enactment of a specific, comprehensive scheme for the acquisition of rights of way across Pueblo lands. In holding there had been a repeal, the Court stated,

> The history of these statutes (26 U.S.C. §§ 311-328; statutes providing for the acquisition of rights of way across Pueblo lands) reflects an effort to overcome the problems caused by the unique nature of Pueblo Indian land holdings and to provide them with the same protections given the lands of other Indians. The United States Supreme Court has held that Pueblo lands are subject to such protection, *United States v. Candelaria*, [271 U.S. 432 (1925)] and *United States v. Sandoval*, [231 U.S. 28 (1913)], and the intent of Congress to provide such protection cannot be doubted.

Accordingly, I will determine whether Congress intended § 17 to grant to the Pueblos authority to alienate their

lands with Secretarial approval, by determining whether such a grant of authority is consistent with the Indian Non-Intercourse Acts, and federal Indian policy generally.

The Constitution rests the power to deal with Indian tribes in the Congress. Included in that power is the exclusive right to extinguish Indian titles. Act of June 30, 1834, 4 Stat. 730; *U.S. v. Santa Fe Pacific Rlwy Co.*, 314 U.S. 339, 347 (1941). Congress' intent to authorize alienation of Indian lands must be clear and express. *Chippewa v. U.S.*, 307 U.S. 1 (1939). Doubtful expressions of congressional intent to authorize alienation of Indian land must be resolved in favor "[of the Indian . . . who is] wholly dependent on its [the federal government's] protection and good faith." *U.S. v. Santa Fe Pacific Rlwy Co.*, at 354. Although Congress may delegate its power, the unilateral action of an officer of the Executive Branch cannot alienate land. Whether Congress intended to delegate its authority to alienate Indian lands must be determined against the "strong background of maintenance of congressional control." *Turtle Mountain Band of Chippewa Indians v. U.S.*, 490 F.2d 935, 946 (Ct. Claims 1974).

By the terms of § 17 of the Pueblo Lands Act, there is no authorization for the grant or sale of Pueblo lands. Although such authorization might be inferred from the Section's requirement of Secretarial approval, I decline to do so. The claimed authorization is not clear and express. Furthermore, it would be anomalous to conclude that Congress, having expressed its intention to afford the Pueblos the protection of other Indians, abandoned its objective and completely delegated its authority to the Secretary, with no restrictions, unlike other Indian Tribes. Such irrationality and arbitrariness should not be attributed to the Congress that was attempting to solve the problems created by the Supreme Court's erroneous decision in *Joseph. See Morton v. Mancari*, 417 U.S. 535, 548 (1974).

The construction of § 17 offered by the Pueblo is certainly more reasonable. The Secretary has adopted the construction offered by the Pueblo. 25 C.F.R. 121.22 provides:

> Tribal Lands, Lands held in trust by the United States for an Indian Tribe. Lands owned by a tribe with federal restrictions against alienation and any other land owned by an Indian Tribe may only be conveyed where specific statutory authority exists and then only with the approval of the Secretary unless the act of Congress authorizing sale provides that approval is unnecessary. (See 25 U.S.C. 177 [Act of June 30, 1834]).

Although the Secretary has not always construed the Act of June 30, 1834 and § 17 of the Pueblo Lands Act to require congressional authorization (apart from § 17) and the approval of the Secretary, as evidenced by the Secretary's approval of the right of way at issue in this case, the Secretary's differing constructions of § 17 illustrates my conclusion that § 17 was not a clear and express grant of authority to the Secretary and the Pueblos to alienate Pueblo lands.

RES JUDICATA AND COLLATERAL ESTOPPEL

Telephone also argues Pueblo's claim from 1928 to the present is barred by the judgment in *U.S. v. Brown*, No. 1814 Equity (D.N.M. 1928). *Brown* was brought by the United States as guardian of the Pueblo pursuant to § 4 of the Pueblo Lands Act to quiet title to Santa Ana Pueblo lands. In the course of the suit, before Telephone filed its answer, the United States moved to dismiss Telephone on the ground that Telephone had obtained a valid

right of way, the right of way at issue here. Dismissal was ordered the day the motion was filed and the order of dismissal did not state whether the dismissal was with or without prejudice. The dismissal is, therefore, without prejudice. Fed.R.Civ.P. 41; *Homeowners' Loan Corp. v. Huffman*, 134 F.2d 314, 317 (8th Cir. 1943).

Telephone argues that Pueblo's claims from 1928 are *res judicata* and that the Pueblo is collaterally estopped from relitigating the validity of the right of way at issue in this case. A final judgment on the merits is essential in order for an action to be *res judicata*. For collateral estoppel to apply, the factual issue must have been actually litigated and necessarily decided. Wright, Miller and Cooper, *Federal Practice and Procedure*: Jurisdiction § 4406 at p. 45; *Craft v. Choate*, No. 81-1893 (10th Cir. Slip Opinion, April 5, 1982). There was no judgment on the merits in *Brown* and the validity of Telephone's right of way was not actually litigated or necessarily decided.

Telephone concedes that it was dismissed from the suit on the pretrial motion of the United States, but it maintains that the dismissal should be afforded the status of a judgment on the merits because of the Court's observation in the order of dismissal that "it appear[ed] to the court that since the institution of this suit, said defendant has secured good and sufficient title to the right of way and premises in controversy herein between plaintiff and said defendant by deed from the Pueblo of Santa Ana approved April 13, 1928 by the Secretary of Interior in accordance with the provisions of § 17 of the Pueblo Lands Act of June 7, 1924."

I am not convinced that the court's observation as to the reasons the United States moved for dismissal should elevate the order of dismissal to the status of an order on the merits. Substance must govern over form. The order of dismissal in *Brown* was not an order on the

merits and the issue of the validity of Telephone's right of way was not actually litigated and necessarily decided. It is not uncommon for a court to state in its order of dismissal the reason plaintiff moved for the dismissal. Plaintiff's claims are not *res judicata* and the factual issues present in those claims are not precluded by collateral estoppel.

In conclusion, § 17 of the Pueblo Lands Act was intended by Congress to reaffirm the protections afforded the Pueblos under the Acts of June 30, 1834 and February 27, 1851. It was not intended to grant to the Pueblos and the Secretary *carte blanc* to alienate Pueblo lands for any reason. Plaintiffs claims are not barred by the judgment in *U.S. v. Brown*. The Pueblo shall recover damages from April 13, 1928 to the date the defendant's telephone and telegraph line was removed. Plaintiff's prayer for punitive damages is denied.

/s/ E. L. Mechem
United States District Judge

APPENDIX C

Pueblo Land Act of June 7, 1924, Act of June 7, 1924, c. 331, 43 Stat. 636, as amended by Act of May 31, 1933, c. 45, § 7, 48 Stat. 111, provides:

"1. That in order to quiet title to various lots, parcels, and tracts of land in the State of New Mexico for which claim shall be made by or on behalf of the Pueblo Indians of said State as hereinafter provided, the United States of America, in its sovereign capacity as guardian of said Pueblo Indians shall, by its Attorney General, file in the District Court of the United States for the District of New Mexico, its bill or bills of complaint with a prayer for discovery of the nature of any claim or claims of any kind whatsoever adverse to the claim of said Pueblo Indians, as hereinafter determined.

"2. That there shall be, and hereby is, established a board to be known as 'Pueblo Lands Board' to consist of the Secretary of the Interior, the Attorney General, each of whom may act through an assistant in all hearings, investigations, and deliberations in New Mexico, and a third member to be appointed by the President of the United States. The board shall be provided with suitable quarters in the city of Santa Fe, New Mexico, and shall have power to require the presence of witnesses and the production of documents by subpoena, to employ a clerk who shall be empowered to administer oaths and take acknowledgments, shall employ such clerical assistance, interpreters, and stenographers with such compensation as the Attorney General shall deem adequate, and it shall be provided with such necessary supplies and equipment as it may require on requisitions to the Department of Justice. The compensation and allowance for travel and expenses of the member appointed by the President shall be fixed by the Attorney General.

"It shall be the duty of said board to investigate, determine, and report and set forth by metes and bounds, illustrated where necessary by field notes and plats, the

lands within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico by any authority of the United States of America, or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise, title to which the said board shall find not to have been extinguished in accordance with the provisions of this Act, and the board shall not include in their report any claims of non-Indian claimants who, in the opinion of said board after investigation, hold and occupy such claims of which they have had adverse possession, in accordance with the provisions of section 4 of this Act: Provided, however, That the board shall be unanimous in all decisions whereby it shall be determined that the Indian title has been extinguished.

"The board shall report upon each pueblo as a separate unit and upon the completion of each report one copy shall be filed with the United States District Court for the District of New Mexico, one with the Attorney General of the United States, one with the Secretary of the Interior, and one with the Board of Indian Commissioners.

"3. That upon the filing of each report by the said board, the Attorney General shall forthwith cause to be filed in the United States District Court for the District of New Mexico, as provided in section 1 of this Act, a suit to quiet title to the lands described in said report as Indian lands the Indian title to which is determined by said report not to have been extinguished.

"4. That all persons claiming title to, or ownership of, any lands involved in any such suit, or suits, may in addition to any other legal or equitable defenses which they may have or have had under the laws of the Territory and State of New Mexico, plead limitation of action, as follows, to wit:

"(a) That in themselves, their ancestors, granted privies, or predecessors in interest or claim of interest,

they have had open, notorious, actual, exclusive, continuous, adverse possession of the premises claimed, under color of title from the 6th day of January, 1902, to the date of the passage of this Act [June 7, 1924], and have paid the taxes lawfully assessed and levied thereon to the extent required by the statutes of limitation, or adverse possession of the Territory or of the State of New Mexico, since the 6th day of January, 1902, to the date of the passage of this Act [June 7, 1924], except where the claimant was exempted or entitled to be exempted from such tax payment.

"(b) That in themselves, their ancestors, grantors, privies, or predecessors in interest or claim of interest, they have had open, notorious, actual, exclusive, continuous, adverse possession of the premises claimed with claim of ownership, but without color of title from the 16th day of March, 1889, to the date of the passage of this Act [June 7, 1924], and have paid the taxes lawfully assessed and levied thereon to the extent required by the statutes of limitation or adverse possession of the Territory or of the State of New Mexico, from the 16th day of March, 1899, to the date of the passage of this Act [June 7, 1924], except where the claimant was exempted or entitled to be exempted from such tax payment.

"Nothing in this Act contained shall be construed to impair or destroy any existing right of the Pueblo Indians of New Mexico to assert and maintain unaffected by the provisions of this Act their title and right to any land by original proceedings, either in law or equity, in any court of competent jurisdiction and any such right may be asserted at any time prior to the filing of the field notes and plats as provided in section 13 hereof, and jurisdiction with respect to any such original proceedings is hereby conferred upon the United States District Court for the District of New Mexico with right of review as in other cases: Provided, however, That any contract entered into with any attorney or attorneys by the Pueblo

Indians of New Mexico, to carry on such litigation shall be subject to and in accordance with existing laws of the United States.

"5. The plea of such limitations, successfully maintained, shall entitle the claimants so pleading to a decree in favor of them, their heirs, executors, successors, and assigns for the premises so claimed by them, respectively, or so much thereof as may be established, which shall have the effect of a deed of quit-claim as against the United States and said Indians, and a decree in favor of claimants upon any other ground shall have a like effect.

"The United States may plead in favor of the pueblo, or any individual Indian thereof, as the case might be, the said limitations hereinbefore defined.

"6. It shall be the further duty of the board to separately report in respect of each such pueblo—

"(a) The area and character of any tract or tracts of land within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico and the extent, source, and character of any water right appurtenant thereto in possession of non-Indian claimants at the time of filing such report, which are not claimed for said Indians by any report of the board.

"(b) Whether or not such tract or tracts of land or such water rights could be or could have been at any time recovered for said Indians by the United States by seasonable prosecution of any right of the United States or of said Indians. Seasonable prosecution is defined to mean prosecution by the United States within the same period of time as that within which suits to recover real property could have been brought under the limitation statutes of the Territory and State of New Mexico.

"(c) The fair market value of said water rights and of said tract or tracts of land (exclusive of any improvements made therein or placed thereon by non-Indian

claimants) whenever the board shall determine that such tract or tracts of land or such water rights could be or could have been at any time recovered for said Indians by the United States by seasonable prosecution of any right of the United States or of said Indians, and the amount of loss, if any, suffered by said Indians through failure of the United States seasonably to prosecute any such right.

"The United States shall be liable, and the board shall award compensation, to the pueblo within the exterior boundaries of whose lands such tract or tracts of land shall be situated or to which such water rights shall have been appurtenant to the extent of any loss suffered by said Indians through failure of the United States seasonably to prosecute any right of the United States or of said Indians, subject to review as herein provided. Such report and award shall have the force and effect of a judicial finding and final judgment upon the question and amount of compensation due to the Pueblo Indians from the United States for such losses. Such report shall be filed simultaneously with and in like manner as the reports hereinbefore provided to be made and filed in section 2 of this Act.

"At any time within sixty days after the filing of said report with the United States District Court for the District of New Mexico as herein provided the United States or any pueblo or Indians concerned therein or affected thereby may, in respect of any report upon liability or of any finding of amount or award of compensation set forth in such report, petition said court for judicial review of said report, specifying the portions thereof in which review is desired. Said court shall thereupon have jurisdiction to review, and shall review, such report, finding, or award in like manner as in the case of proceedings in equity. In any such proceeding the report of the board shall be prima facie evidence of the facts, the values, and the liability therein set forth, subject, however, to be re-

butted by competent evidence. Any party in interest may offer evidence in support or in opposition to the findings in said report in any respect. Said court shall after hearing render its decision so soon as practicable, confirming, modifying, or rejecting said report or any part thereof. At any time within thirty days after such decision is rendered said court shall, upon petition of any party aggrieved, certify the portions of such report, review of which has been sought, together with the record in connection therewith, to the United States Circuit Court of Appeals for the Eighth Circuit, which shall have jurisdiction to consider, review, and decide all questions arising upon such report and record in like manner as in the case of appeals in equity, and its decision thereon shall be final.

"Petition for review of any specific finding or award of compensation in any report shall not affect the finality of any findings nor delay the payment of any award set forth in such report, review of which shall not have been so sought, nor in any proceeding for review in any court under the provisions of this section shall costs be awarded against any party.

"7. It shall be the further duty of the board to investigate, ascertain, and report to the Secretary of the Interior who shall report to the Congress of the United States, together with his recommendation, the fair market value of lands, improvements appurtenant thereto, and water rights of non-Indian claimants who, in person or through their predecessors in title prior to January 6, 1912, in good faith and for a valuable consideration purchased and entered upon Indian lands under a claim of right based upon a deed or document purporting to convey title to the land claimed or upon a grant, or license from the governing body of a pueblo to said land, but fail to sustain such claim under the provisions of this Act, together with a statement of the loss in money value thereby suffered by such non-Indian claimants. Any lands

lying within the exterior boundaries of the pueblo of Nambe land grant, which were conveyed to any holder or occupant thereof or his predecessor or predecessors in interest by the governing authorities of said pueblo, in writing, prior to January 6, 1912, shall unless found by said board to have been obtained through fraud or deception, be recognized as constituting valid claims by said board and by said courts, and disposed of in such manner as lands the Indian title to which has been determined to have been extinguished pursuant to the provisions of this Act: Provided, That nothing in this section contained with reference to the said Nambe Pueblo Indians shall be construed as depriving the said Indians of the right to impeach any such deed or conveyance for fraud or to have mistakes therein corrected through a suit in behalf of said pueblo or of an individual Indian under the provisions of this Act.

"8. It shall be the further duty of the board to investigate, ascertain, and report to the Secretary of the Interior the area and the value of the lands and improvements appurtenant thereto of non-Indian claimants within or adjacent to Pueblo Indian settlements or towns in New Mexico, title to which in such non-Indian claimants is valid and indefeasible, said report to include a finding as to the benefit to the Indians in anywise of the removal of such non-Indian claimants by purchase of their lands and improvements and the transfer of the same to the Indians, and the Secretary of the Interior shall report to Congress the facts with his recommendations in the premises.

"9. That all lands, the title to which is determined in said suit or suits, shall, where necessary, be surveyed and mapped under the direction of the Secretary of the Interior, at the expense of the United States, but such survey shall be subject to the approval of the judge of the United States District Court for the District of New Mexico, and if approved by said judge shall be filed in

said court and become a part of the decree or decrees entered in said district court.

"10. That necessary costs in all original proceedings under this Act, to be determined by the court, shall be taxed against the United States and any party aggrieved by any final judgment or decree shall have the right to a review thereof by appeal or writ of error or other process, as in other cases, but upon such appeal being taken each party shall pay his own costs.

"11. That in the sense in which used in this Act the word 'purchase' shall be taken to mean the acquisition of community lands by the Indians other than by grant or donation from a sovereign.

"12. That any person claiming any interest in the premises involved but not impleaded in any such action may be made a party defendant thereto or may intervene in such action, setting up his claim in usual form.

"13. That as to all lands within the exterior boundaries of any lands granted or confirmed to the Pueblo Indians of New Mexico, by any authority of the United States of America or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise and which have not been claimed for said Indians by court proceedings then pending or the findings and report of the board as herein provided, the Secretary of the Interior at any time after two years after the filing of said reports of the board shall file field notes and plat for each pueblo in the office of the surveyor general of New Mexico at Santa Fe, New Mexico, showing the lands to which the Indian title has been extinguished as in said report set out, but excluding therefrom lands claimed by or for the Indians in court proceedings then pending, and copies of said plat and field notes certified by the surveyor general of New Mexico as true and correct copies shall be accepted in any court as competent and conclusive evidence of the extinguishment of all the right, title, and in-

terest of the Indians in and to the lands so described in said plat and field notes and of any claim of the United States in or to the same. And the Secretary of the Interior within thirty days after the Indians' right to bring independent suits under this Act shall have expired, shall cause notice to be published in some newspaper or newspapers of general circulation issued, if any there be, in the county wherein lie such lands claimed by non-Indian claimants, respectively, or wherein some part of such lands are situated, otherwise in some newspaper or newspapers of general circulation published nearest to such lands, once a week for five consecutive weeks, setting forth as nearly as may be the names of such non-Indian claimants of land holdings not claimed by or for the Indians as herein provided, with a description of such several holdings, as shown by a survey of Pueblo Indian lands heretofore made under the direction of the Secretary of the Interior and commonly known as the 'Joy Survey,' or as may be otherwise shown or defined by authority of the Secretary of the Interior, and requiring that any person or persons claiming such described parcel or parcels of land or any part thereof, adversely to the apparent claimant or claimants so named as aforesaid, or their heirs or assigns, shall, on or before the thirtieth day after the last publication of such notice, file his or their adverse claim in the United States Land Office in the land district wherein such parcel or parcels of land are situate, [sic] in the nature of a contest, stating the character and basis of such adverse claim, and notice of such contest shall be served upon the claimant or claimants named in the said notice, in the same manner as in cases of contest of homestead entries. If no such contest is instituted as aforesaid, the Secretary of the Interior shall issue to the claimant or claimants, or their heirs or assigns, a patent or other certificate of title for the parcel or parcels of land so described in said notice; but if a contest be filed it shall proceed and be heard and decided as contests of homestead entries are heard and

decided under the rules and regulations of the General Land Office pertinent thereto. Upon such contest either party may claim the benefit of the provisions of section 4 of this Act to the same extent as if he were a party to a suit to quiet title brought under the provisions of this Act, and the successful party shall receive a patent or certificate of title for the land as to which he is successful in such proceeding. Any patent or certificate of title issued under the provisions of this Act shall have the effect only of a relinquishment by the United States of America and the said Indians.

"If after such notice more than one person or group of persons united in interest makes claim in such land office adverse to the claimant or claimants named in the said notice, or to any other person or group of persons who may have filed such contest, each contestant shall be required to set forth the basis and nature of his respective claim, and thereupon the said claims shall be heard and decided as upon an original contest or intervention.

"And in all cases any person or persons whose right to a given parcel or parcels of land has become fixed either by the action of the said board or the said court or in such contest may apply to the Commissioner of the General Land Office for a patent or certificate of title and receive the same without cost or charge.

"14. That if any non-Indian party to any such suit shall assert against the Indian title a claim based upon a Spanish or Mexican grant, and if the court should finally find that such claim by the non-Indian is superior to that of the Indian claim, no final decree or judgment of ouster of the said Indians shall be entered or writ of possession or assistance shall be allowed against said Indians, or any of them, or against the United States of America acting in their behalf. In such case the court shall ascertain the area and value of the land thus held by any non-Indian claimant under such superior title, excluding therefrom the area and value of lots or parcels of land the title to

which has been found to be in other persons under the provisions of this Act: Provided, however, That any findings by the court under the provisions of this section may be reviewed on appeal or writ of error at the instance of any party aggrieved thereby, in the same manner, to the same extent, and with like effect as if such findings were a final judgment or decree. When such findings adverse to the Indian claim has become final, the Secretary of the Interior shall report to Congress the facts, including the area and value of the land so adjudged against the Indian claim, with his recommendations in the premises.

"15. That when any claimant, other than the United States for said Indians not covered by the report provided for in section 7 of this Act, fails to sustain his claim to any parcel of land within any Pueblo Indian grant, purchase, or donation under the provisions of this Act, but has held and occupied any such parcel in good faith, claiming the same as his own, and the same has been improved, the value of the improvements upon the said parcel of land shall be found by the court and reported by the Secretary of the Interior to Congress, with his recommendations in the premises.

"16. That if the Secretary of the Interior deems it to be for the best interest of the Indians that any land adjudged by the court or said Lands Board against any claimant be sold, he may, with the consent of the governing authorities of the pueblo, order the sale thereof, under such regulations as he may make, to the highest bidder for cash; and if the buyer thereof be other than the losing claimant, the purchase price shall be used in paying such losing claimant the adjudicated value of the improvements aforesaid, if found under the provisions of section 15 hereof, and the balance thereof, if any, shall be paid over to the proper officer, or officers, of the Indian community, but if the buyer be the losing claimant, and the value of his improvements has been adjudicated

as aforesaid, such buyer shall be entitled to have credit upon his bid for the value of such improvements so adjudicated.

"17. No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the lands of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

"18. That the pleading, practice, procedure, and rules of evidence shall be the same in all causes arising under this Act as in other civil causes in the Federal courts, except as otherwise herein provided.

"19. That all sums of money which may hereafter be appropriated by the Congress of the United States for the purpose of paying in whole or in part any liability found or decreed under this Act from the United States to any Pueblo or to any of the Indians of any pueblo, shall be paid over to the Bureau of Indian Affairs, which Bureau, under the direction of the Secretary of the Interior, shall use such moneys at such times and in such amounts as may seem wise and proper for the purpose of the purchase of lands and water rights to replace those which have been lost to said pueblo or to said Indians, or for purchase or construction of reservoirs, irrigation works, or the making of other permanent improvements upon, or for the benefit of lands held by said pueblo or said Indians."

APPENDIX D

Act of June 30, 1834, c. 161, Section 12, 4 Stat. 730,
25 U.S.C. § 177

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.